

## THE PROSPECTIVE NEW COPYRIGHT LAW

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It is common for writers and speakers on copyright to begin by quoting the clause in the Federal Constitution on which our copyright law is founded. This has become a cliché because it has the merit of compressing some profound concepts in a few words. Congress shall have the power, the Constitution says, "To promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

In paraphrase, to enable authors to devote their time and talent to the creation of works of literature, music, and the arts, the copyright law gives them property rights in their creations whereby they can reap economic rewards for their contributions to learning and culture. As Justice Reed put it in a leading decision of the Supreme Court:

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the service rendered.

[*Mazer v. Stein*, 347 U.S. 201, 219]

Between 1790, when the First Congress enacted our first copyright law, and 1909, when the most recent revision was adopted, social and economic change impelled a comprehensive rewriting of the copyright law about every forty years. Another complete revision of the 1909 model—now almost sixty years old—is overdue.

Twelve years of steady and painstaking work have gone into the current revision project. Copyright is a complex subject of many facets, but I think it is no exaggeration to say that every important issue has been considered in depth. All of the many and diverse interested groups have contributed their thinking and suggestions to the process of bringing the problems into focus and finding solutions, and their cooperation and good will have been essential in the search for accommodations of differing points of view. In particular, one

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should mention that the dedication of the members of the Congressional committees in giving so much of their time and attention to the revision problems has been remarkable. The years of labor promise to come to their final fruition during the next year when the new copyright law is expected to be enacted.

I shall not review the entire bill or even the many changes it makes in the present law. Many of its provisions, though vitally important for the particular interest groups concerned, would probably be of no special interest to librarians and publishers; few would feel much concern, for example, about the provisions concerning jukeboxes, or community antenna television systems, or the royalty rate for making phonograph records, or the termination of assignment contracts, all of which have been controversial issues of prime importance to the industry groups affected.

The broad scope of the revision bill is indicated by the length of the bill itself—55 pages—and of the House Committee Report—144 pages. The Report explains in considerable detail what the bill provides and why.

I propose to review below those half dozen issues on which the library and educational groups have manifested a special interest. To those who wish to delve more deeply or widely, I commend the House Committee Report<sup>1</sup> on the copyright law revision.

1. Fair Use. The issue to which both library and educational groups have given most attention has been that of making copies of copyrighted material. Quite early in the revision program, the major library associations\* formed a joint committee to consider the problem of photocopying by libraries as fair use. The joint committee assembled information on the photocopying practices of libraries generally and conducted studies of the actual photocopying carried on in several large research and university libraries over a period of time. It concluded, in a report made in 1961, that what the libraries were doing in supplying to patrons upon request, single photocopies of copyrighted material, mostly of individual articles in journals, was in line with traditional library service and was not injuring copyright owners. It recommended that libraries adopt the policy of supplying a single photocopy of any material upon request, with the later qualification that before making a copy of an entire work, the library should try to ascertain whether a copy is available through normal trade channels.

That recommendation was quite similar to a suggestion made in the 1961 Report of the Register of Copyrights,<sup>2</sup> in which the

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\*American Library Association, Association of Research Libraries, Special Libraries Association, and American Association of Law Libraries.

Copyright Office put forward its initial proposals for a new copyright law as a basis for discussion. The library associations eventually decided, however, that they would prefer not to have any formula on library photocopying spelled out in the statute; even if it seemed appropriate for the present, they felt, a statutory formula might prove to be rigidly narrow in the future. The author groups were also opposed to the suggested statutory provisions on the ground that they might prove to be too broad. There was agreement on both sides that the problem was best left to the flexible principles governing fair use.

Fair use is an equitable doctrine that can no more be stated in precise terms or as a rule-of-thumb than concepts such as due care or ethical conduct or fair play. You will find no mention of fair use in the present copyright statute, which provides for the exclusive right of the copyright owner to copy his work, without qualification. But the courts, over the years, have developed the fair use doctrine in a variety of situations. The courts have adhered to the basic copyright principle of protecting copyright owners against copying that may make inroads into the potential market for their works; but at the same time the courts have responded to the need for flexibility by allowing, as fair use, limited copying for socially useful purposes where the value of the copyright would not be appreciably affected.

The revision bill contains, for the first time, a statutory declaration of the fair use doctrine. The history of the fair use section in the bill has some aspects that are amusing in retrospect, but amusement was no part of the sharp and sometimes heated debate on the request of an ad hoc group of educational organizations for special exemptions to allow copying of copyrighted material for educational purposes.

The revision bill initially drafted in 1964 as a basis for discussion contained a provision on fair use consisting of two sentences. The first sentence stated broadly that fair use of a work is not an infringement, and cited, as examples of purposes for which uses might qualify as fair use, "criticism, comment, news reporting, teaching, scholarship, or research." The second sentence stated four factors, which had been distilled from the court decisions, to be considered in determining whether the use made of a work in any particular case is a fair use. These four factors were: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

The librarians appeared to be content with these provisions. The ad hoc educational group approved of the first sentence but wanted the second sentence omitted. Teachers, they said, were not familiar with the fair use doctrine, and the limitations implied by the four

factors would frighten them away from reproducing pertinent material for classroom use. The authors and publishers, on the other hand, were fearful that the first sentence might be read by teachers and others to allow them wide freedom to make copies for the purposes cited as examples, while the limitations inherent in the four factors stated in the second sentence would be overlooked.

With both sides having opposed the initial draft of the fair use provision, though for opposite reasons, the bill as reformulated and introduced in 1965 for Congressional consideration stated simply that "the fair use of a copyrighted work is not an infringement of copyright."

Meanwhile the education group urged the addition to the bill of a new section that would, in substance, permit any teacher or other person to make any number of copies of "excerpts" from copyrighted works, and an individual copy of a complete work, for use in a non-profit educational institution. The reaction by the representatives of the authors and publishers was predictably stormy. I shall not trace the further pulling and hauling that threatened to produce an impasse on this issue. After a series of meetings at which the author, publisher, and education groups were brought together, they finally reached a settlement of the issue by agreeing upon a modified version of the original two-sentence provision on fair use, with the understanding that the application of the criteria of fair use to the making of copies for classroom teaching would be explained in some detail in the House Committee Report on the bill.

The House Committee adopted this resolution of the issue and devoted eight tightly-packed pages of its Report to a review of the fair use doctrine, with special emphasis on its application to reproduction for purposes of teaching.

The House Committee also added another feature in this situation. Responding to the argument that teachers are generally not familiar with the fair use concept, the Committee inserted a provision in the bill that, in a case where a teacher has over-stepped the bounds of fair use in making copies for classroom teaching, but has done so in the honest belief that it was a fair use, the court may reduce or remit the statutory damages that would usually be assessed against an infringer.

A group of library spokesmen has since suggested to the Senate Subcommittee that a similar provision should be added with respect to librarians who innocently overstep the bounds of fair use.

2. Copyright Notice. Another issue on which library groups have expressed a major interest is the requirement in the present law that a copyright notice be placed on the published copies of a work. There was some movement among authors' societies, at an earlier stage of the revision discussions, for eliminating the notice



requirement—and incidentally, there is generally no requirement of a notice in the copyright laws of other countries. But librarians, among others, have taken a strong position in favor of keeping the notice as a convenient source of information concerning the copyright status of a work and its currency.

The grave fault of the notice provisions in the present law has been that technical omissions and errors in complying with the rather rigid specifications for the notice could often bring about the forfeiture of copyright. The revision bill continues to require that a copyright notice be placed on published copies, but it seeks to avoid forfeitures by allowing omissions or errors to be cured. So, where the notice has been omitted, the copyright can be preserved by making a registration within five years after the publication of copies without the notice. Nevertheless, anyone who acts in good faith in reliance upon the absence of a notice, and thereby infringes innocently, is shielded from liability for the infringement.

A special point made by library associations, particularly in relation to maps, is that the notice should be required to contain the year of publication. The present law allows the year date to be omitted from the notice on maps and other graphic, pictorial and art works; the proposed bill as it now stands requires the year date as part of the notice on all kinds of works.

An objection has been voiced by one library group to the bill's departure from the precise specifications in the present law of the place in the copies where the notice is to appear. These specifications are an example of the rigidities in the present notice provisions that have caused trouble for copyright claimants. The revision bill allows placement of the notice in any position where it will reasonably serve the purpose of giving notice of the copyright.

**3. Manuscripts.** One of the fundamental changes that the bill will effect in our copyright system will have consequences of considerable significance for libraries having manuscript collections. At present, unpublished works are subject to the literary property rights of the author and his heirs, under the common law, with no time limit. So there is always the possibility today that the author's heirs may assert their literary property rights in old manuscripts.

The revision bill would do away with common law literary property, granting instead copyright protection under the statute to unpublished as well as published works. But the copyright in all cases would expire after the term fixed in the statute: manuscripts would then go into the public domain fifty years after the author's death or, if the author is unknown, when the manuscript is one hundred years old.

The revision bill also contains another innovation regarding manuscripts and other unpublished materials in the collections of

any nonprofit archival institution. The bill explicitly permits any such institution to make facsimile copies of unpublished works in its collections "for purposes of preservation and security, or for deposit for research use in any other such institution." The making of such copies today may well be a violation of the literary property rights of the author or his heirs.

4. Duration. One of the most important changes made in the revision bill is in the duration of copyright. Our present term of twenty-eight years from publication of the work plus a renewal for another twenty-eight years leaves us standing virtually alone in the world. Almost all other countries have a copyright term running for the life of the author and a period of years after his death; and most commonly, this period after death is fifty years. In an era of world-wide distribution and transmission of works of authorship, our unique term of copyright has become an anachronism and causes complications in the international uses of works. The revision bill adopts, for works created in the future, the term most prevalent throughout the world: the life of the author plus fifty years.

The life-plus-fifty term is one of the keystones of the bill and has the overwhelming endorsement of almost all interested groups. To the authors, this is probably the most important single feature of the entire bill. And the adoption of this term will remove what has been the main obstacle to our joining the older and more pervasive international copyright convention, that of the Berne Union.

Some groups of librarians and educators have expressed opposition to basing our term on the life of the author, in spite of the fact that the rest of the world does so. The main objection to a term based on the author's life has been that it may often be difficult, and sometimes impossible, to ascertain when an obscure author died. In order to explain how the bill meets this objection, I must go back for a moment.

There are some situations in which the term cannot be measured from the author's death. In this category are anonymous works and the many works of corporate authorship. For these works the bill provides for a term of seventy-five years from publication or, to take care of unpublished works, a hundred years from their creation.

Now coming back to works by obscure authors whose death date would be difficult to ascertain: the bill provides for a record of the death dates of authors to be kept in the Copyright Office; and if the Office cannot provide information as to when an author died, the copyright in his work is presumed to have expired seventy-five years after its publication or a hundred years after its creation, whichever is earlier.

I might add that even the library and education spokesmen who have opposed the term of the author's life plus fifty years have expressed their assent to lengthening the present term. Instead of the present twenty-eight years from publication plus a renewal of twenty-eight years, they have suggested twenty-eight years plus a renewal of forty-seven years, or a total of seventy-five years from publication. And this, incidentally, is what the bill provides for copyrights already in existence when the new law becomes effective.

5. Uses of Works in Computer-based Systems. The 1961 Register's Report<sup>3</sup> carries no discussion of what has since become one of the most important problems in copyright revision, that of the computer uses of copyrighted materials. There were brief references to the question in panel discussions convened by the Register of Copyrights in 1963, but not until 1965 did this become a significant issue. The debate had begun, but it produced little testimony on the problem at public hearings conducted by the House Committee in 1965. This seems strange in the light of the advancing computer technology at that time, but there was little realization of the probable impact of the computer in this area, and it was too early to formulate positions. The ensuing discussion and speculation has dealt, for the most part, with the future.

Basic to the debate is the projection of the changes foreseen in the coming age of the computer. There are those who see what is happening as the beginning of a social revolution comparable to that brought about by Gutenberg's introduction of movable type. Others read events as more evolutionary, with the computer accelerating tremendously the speed and efficiency of the processing and distribution of intellectual works. As between these differences in outlook, I believe that computers and associated technology will revolutionize the distribution of works of authorship, but that we shall still need to enlist the skill and talent of human authors and pay them to produce those works.

Whatever the future may hold, we have little or no practical experience to go on. In the absence of experience, there is much fear of the impending collision between computers and copyright. Congress, in working on a complete revision of the copyright law, must now decide: shall it legislate on the computer issue or wait for further developments?

The present revision bill, with one exception which I shall advert to later, carries no special provisions for computer uses. It assumes that the broad principles governing the uses of copyrighted works in other media are appropriate for their use in computer-based systems. Under the bill, copyright would apply to the reproduction of works for and by computer systems, subject to the principles of fair use.



The problem may be seen in three aspects. The first is the "input" problem: whether the reproduction of a single copy of an entire work, or substantial parts of it, for storage and use by a computer does or should constitute copyright infringement. The second is the "scanning" question: the effect of scanning or manipulation of material stored in the computer. The third is the "output" problem: what forms of "read-out," "print-out," or "display" should constitute infringement?

On the question of input, it is difficult to find authority for the argument that the unauthorized reproduction of an entire book for storage in a computer is not an infringement under the present law. The making of punch cards, magnetic tapes, etc., for input, capable of serving the same purpose as hundreds or thousands of traditional copies seems a clear violation of the owner's basic right to "print, reprint, publish, copy, and vend" his work.

On the second question, scanning or manipulation of the contents of a work within the system does not involve a reproduction, the preparation of a derivative work, or a public distribution, performance, or display, and thus would not be an infringement.

On the output problem, there is little dispute that, under the present law and the bill, the print-out in hard copy of substantial parts of a work should constitute an infringement. As elsewhere, there are areas of disagreement as to what constitutes "fair use" on output.

A difficult problem is presented by displays of the stored text of works on viewing devices connected through a transmission system with a computer-based library. The revision bill grants an exemption for performances or displays in transmissions of instructional programs of nonprofit educational institutions, and this applies broadly to in-school transmissions, whether by broadcasting or closed circuit. It does not appear likely that such transmissions would displace the use in schools of copies of the works presented in the transmissions. But a radically different result is feared by authors and publishers when central information storage systems, such as automated libraries, are combined with transmission networks so that students and researchers having access to a receiving unit can call up, at will, an image reproduction of any work in the system, whenever and as often as they wish. This could, it is argued, destroy the market for printed copies, and the bill as passed by the House does not exempt such networks of reproductive-transmissions-upon-demand from copyright control.

Some educators and librarians have objected to the exclusion of such networks from the exemption, while author and publisher groups have insisted that an exemption here would be disastrous. For the most part, arguments have centered on this point and on the question of whether input of a work itself should be subject to copyright.



Related to this discussion is the important subsidiary question of the establishment of mass-licensing systems for computer uses.

No one questions the fact that the increasing use of computers will present copyright problems requiring special legislative solutions. Such solutions require solid information and experience on which to base the kind of carefully-wrought statutory provisions necessary to preserve copyright protection without unjustifiably restricting the development of computer technology. The House Judiciary Committee, in its Report on the revision bill, put it this way: "Recognizing the profound impact that information storage and retrieval devices seem destined to have on authorship, communications, and human life itself, the committee is also aware of the dangers of legislating prematurely in this area of exploding technology."

The anticipated development of central data banks and computer-based information systems raises many questions which have not been explored. The demands of computers, or rather of those who control computers, upon copyright works are enormous. If a few large systems are to be all inclusive, the costs will be terrific, and inevitably the operators must face the question of selection. Who is to make the selection? If these are to be central systems, will everyone have access to them? If the original work is to be converted or abstracted for computer input, what safeguards are there for insuring the integrity of the work? How can this integrity be maintained in the face of possible manipulation and modification within the computer. These and similar questions are of great concern to the author and scholar and should be of equal concern to all.

Most people who have considered the problem realize the need for more time to gauge the continuing development of computer and associated technology in relation to works of authorship. Experts say it will be five years, more likely ten years, before computer storage of entire works on a large scale is practicable. In the meantime, there has been concern that passage of the revision bill, in its present form, may freeze Congressional action on computers for years to come. I do not believe this will happen but I fully support the suggestions made on both sides for the establishment of a Commission to study the matter and report back to the Congress.

Senator McClellan, Chairman of the Senate Judiciary Subcommittee considering the revision bill, called a meeting of the interested parties on July 25, 1967, to discuss a proposed bill to establish such a study commission. That meeting was attended by about 150 representatives of authors, publishers, educators, librarians, computer users, and government agencies, all of whom favored the idea of such a commission. On August 2, 1967, Senator McClellan introduced S. 2216 to establish a Commission to study and compile "data on the reproduction and use of copyrighted works in automatic systems capable of storing, processing, retrieving, and

transferring information, and by various forms of machine reproduction." The Commission is to make recommendations as to "changes in copyright law or procedures that may be necessary to assure for such purposes access to copyrighted works, and to provide recognition of the rights of copyright owners."

The Commission will be headed by the Librarian of Congress and will consist of twenty-three members, including two members each from the Senate and the House of Representatives, and eighteen persons appointed by the President with the consent of the Senate, with the Register of Copyrights serving *ex officio*. Of the eighteen, seven are to be selected from authors and other copyright owners, seven from users of copyrighted works, and four from the general public. The Commission is to submit a preliminary report within one year, and a final report and recommendations within three years.

On October 12, 1967, the Senate passed S. 2216 and the bill is now pending in the House. Passage of the bill by the House and its final approval during the 1968 session of Congress can be expected.

In the meantime, the Senate Judiciary Committee plans to complete its consideration of the general revision bill in 1968, and enactment of the revision bill during that year is a hopeful prospect.

## REFERENCES

1. "Copyright Law Revision," House Report No. 83, 90th Congress, 1st Session, on H.R. 2512.
2. Sixty-Fourth Annual Report of the Register of Copyrights. Copyright Office, Library of Congress, Washington, D.C., 1962, pp. 5-6.
3. Ibid.